

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, ex rel, W.A. DREW
EDMONDSON, in his capacity as ATTORNEY
GENERAL OF THE STATE OF OKLAHOMA *et al.*,

Plaintiff,

Case No. 4:05-CV-329-TCK-SAJ

V.

TYSON FOODS, INC *et al.*

Defendants,

and

PETERSON FARMS, INC., et al.

Third-Party Plaintiffs,

v.

BRIAN R. BERRY d/b/a TOWN BRANCH GUEST RANCH, et al.,

Third-Party Defendants.

**MOTION FOR LEAVE TO CONDUCT LIMITED EXPEDITED DISCOVERY AND
BRIEF IN SUPPORT**

COMES NOW the Plaintiff, the State of Oklahoma, *ex rel.* W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and the Oklahoma Secretary of the Environment, C. Miles Tolbert (hereinafter “Plaintiff”) and hereby moves this Court pursuant to Federal Rules of Civil Procedure Rule 26(d) for an Order allowing Plaintiff to engage in limited expedited discovery in advance of the Rule 26(f) discovery planning conference. The State of Oklahoma seeks expedited discovery allowing it to secure water, soil and waste samples from poultry operations under the custody or control of the Poultry Integrator Defendants in the

4. For decades the Poultry Integrator Defendants have disposed of their poultry waste on land located within the IRW. Typically the majority of land application occurs in the Spring to early Summer months at the same time thunderstorms will more likely occur. In addition to nutrients such as nitrogen, potassium and phosphorus, poultry waste contains heavy metals such as arsenic, copper and zinc which the Poultry Integrator Defendants add to the feed in order to promote the growth of their poultry. As a result of adding these metals to the feed, the waste from Poultry Integrator Defendants' poultry contains these heavy metals. The Poultry Integrator Defendants' waste also contains hormones and bacteria as well as other pathogens which are present known hazards to human health and the environment. The State of Oklahoma's investigation of the Poultry Integrator Defendants' waste disposal practices has revealed that certain contaminants associated with the land disposal of poultry waste exist at levels within the environment such that they either pose a risk to human health or lead to the creation of chemicals which threaten human health. For example, poultry waste contains high levels of fecal bacteria which make their way into the waters of the IRW. The State of Oklahoma's scientific investigations as well as a great deal of published scholarly research have concluded that bacteria from the Poultry Integrator Defendants' disposal practices are contaminating the groundwater in the IRW. The research has also demonstrated that once the fecal bacteria from the Poultry Integrator Defendants' poultry enter the waters of the IRW, it can reside there for months. The ground water of the IRW serves as drinking water for many rural Oklahomans and also contributes to surface waters that are used for recreation. While the State of Oklahoma continues its investigation into the magnitude of the risks posed to human health caused by the contamination of this watershed, it is also time critical for the State of Oklahoma to proceed this Spring with its investigation into the source of these risks. Securing edge of field

and ground water samples of the rainwater running off and leaching through the fields on which the Poultry Integrator Defendants dispose of their waste is essential to the State of Oklahoma's efforts to track the pollution from its source through the environment. Similarly, samples of the soil and poultry waste from the Poultry Integrator Defendant's operations are needed and are particularly relevant to tracking pollutants such as fecal bacteria as they move from the poultry houses onto the land and into the waters of the IRW where they threaten the health of people using the water. This evidence collected during the period of heavy land application and spring rains is necessary to confirm that these risks to human health and damage to the environment are attributable to the Poultry Integrator Defendants' waste disposal practices. To continue to improve this analysis the State of Oklahoma must have the requested discovery and that discovery must proceed expeditiously. The importance in the State of Oklahoma's request presently lies in the timing of the collection of samples.

5. The sampling sought by this motion is best conducted during the spring months. It is during these months that the most intense efforts are made to clean the waste out of the poultry houses and dispose of it on the fields. These same months coincide with the rainy season when runoff can be collected. It is during the heavy rains characteristic of the spring rainy season that most of pollution moves off of the disposal fields and into the surface and groundwater. It is following these rains that the levels of bacteria as well other pollutants peak in the surface waters of the IRW. This period of time when waste disposal and runoff are greatest coincides with periods of heavy recreational use of the IRW. Sampling of runoff during this time period is essential to characterizing the source and nature of pollutants released from the Poultry Integrator Defendants' operations during the period when the risk to human health and the environment is particularly acute. This is the time of the year when the most comprehensive

show: (1) irreparable injury; (2) some probability of success on the merits; (3) some connection between the expedited discovery and the avoidance of the irreparable injury; and (4) some evidence that the injury which will result without expedited discovery looms greater than the injury the defendant will suffer if the expedited relief is granted. In re Fannie Mae, 227 F.R.D. at 142.

14. Reviewing the limited case law on the issue of expedited discovery reveals that the Tenth Circuit has not yet formally adopted either approach. Clearly, however, the District Court in Colorado and other federal courts have utilized and adopted the "good cause" or reasonableness standard, particularly in cases involving potential irreparable harm. Qwest, 213 F.R.D. at 420; Pod-Ners, 204 F.R.D. at 676; Dimension Data North America, Inc. v. Netstar-1, Inc., 226 F.R.D. 528, 531 (E.D.N.C. 2005) ("[W]here plaintiff requests expedited discovery in preparation for a preliminary injunction determination, an expedited discovery test limited strictly to the *Notaro* factors is not appropriate. Rather, a standard based upon reasonableness or good cause, taking into account the totality of the circumstances, is more in keeping with discretion bestowed upon the court in the Federal Rules of Civil Procedure."). Therefore, this Court should apply a good cause standard based upon the totality of the circumstances in determining whether Plaintiff is entitled to conduct expedited discovery in advance of the Rule 26(f) conference.

15. The State of Oklahoma's scientific investigation has revealed that the water in the IRW contains levels of bacteria which pose a danger to human health from primary body contact (swimming, wading and canoeing). That investigation has also revealed evidence that ground water, including water in the numerous springs in the IRW, has been contaminated so as to be a hazard to persons who drink from such sources. In fact, health officials in Washington County,